United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 18, 2006

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: FedEx Home Delivery
Cases 4-CA-33672, 34189

512-5082-5000
524-0133-1200
524-0133-8700
524-3325-9200
524-3350-6300
625-3317-2300
625-3317-2900
625-3367-5600
625-3930
625-3940
625-8867-0100

This case was submitted to Advice on two issues: (1) whether Section 8(a)(4) prohibits FedEx from constructively terminating its work relationship with an individual who testified at a Board proceeding and was its supervisor as well as a joint employer; and [*FOIA Exemptions 2 and 5*

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We conclude that FedEx violated Section 8(a)(1) and (4) by constructively terminating an individual who testified at a Board proceeding, at which he was found to be a supervisor and joint employer. [*FOIA Exemptions 2 and 5*

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FACTS

In January 2005,[1] the FXG-HD Drivers Association (the Union) filed a representation petition in Case 4-RC-20974 seeking to represent some 30 single and multiple route

[1] All dates are in 2005 unless otherwise indicated.

Contractors employed at the FedEx Home Delivery Terminal (FedEx) in Barrington, New Jersey. Multiple route Contractors, such as Francis Lynch, operated 2 or more routes; they utilized FedEx drivers on the routes they did not drive themselves. The representation hearing, which ran for 21 days between February 3 and March 7, addressed the issues of whether the Contractors were statutory employees or independent contractors, and whether the Union was a statutory labor organization if it had no members who were statutory employees. Among its contentions, FedEx also took the position that multiple route Contractors should be excluded from the unit as supervisors and joint employers.

On August 3 the Board issued an Order agreeing with the Regional Director that most of the Contractors were employees. It remanded the case for making findings concerning the status of the four multiple route Contractors, i.e. whether they were joint employers (along with FedEx) and/or supervisors of the drivers of their second routes. On September 21, the Region issued a Supplemental Decision finding that the four multiple route Contractors, including Lynch, were joint employers and, alternatively, supervisors under the Act.[2] No party requested review.

Lynch testified for the Union on February 3, the first day of the hearing.[3] He was the Union's only witness.[4] At the time of his testimony Lynch owned two trucks. He drove one route and serviced the other using driver Kenneth Scott. Lynch's testimony pertained to all underlying

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[2] The parties had stipulated that the jointly employed drivers should be excluded from the unit.

[3] Lynch was the Treasurer of the Union, one of the main union organizers, and a named plaintiff in a class action lawsuit against FedEx filed in May 2005. FedEx concedes that it knew Lynch was a Union supporter prior to his February 3 testimony. The Union's lawsuit in part challenges FedEx's decision to classify its drivers as independent contractors. Several similar suits have been filed throughout the country by various employees and organizations, with damages allegedly exceeding $200 million. The lawsuits are now consolidated before a multidistrict panel in the United States District Court in Indiana.

[4] Three other multiple route Contractors and three jointly-employed drivers, including Scott, were subpoenaed by the Employer, and testified. Scott testified on February 14.

issues, including his contested status as a joint employer of Scott. Lynch's direct testimony was consistent with the Union's position that he should be included in the unit as an employee of FedEx, and that the Union was a labor organization as defined by the Act.

FedEx makes all of its Contractors carry indemnity insurance and self-covers them as long as they meet certain requirements. One such requirement is that the Contractors have valid physical examinations by a state-certified medical examiner. Physical exams are generally valid for two years.[5]

Lynch's physical exam was two years old as of February 3. FedEx still dispatched Lynch to drive on February 4 and Lynch did so. When Lynch returned to the Terminal, Terminal Manager Mike Kline advised him that his physical was no longer current. As a result, on February 5, Lynch drove his truck 1.5 miles to another driver's house and that driver covered his route.[6] Lynch attempted to get a new physical exam on Saturday, February 5, but the physician's office was closed. On February 7, the next work day, Lynch passed a new physical exam, presented it to FedEx, and went on his route. Lynch serviced his route from February 7 until March 9, without incident.[7]

On March 9, two days after the representation hearing closed, new Terminal Manager Martin DeGugliamo advised Lynch that FedEx was terminating his indemnity insurance for both of his trucks because he breached FedEx's safe driving standards by driving without a valid physical.[8]

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[5] Lynch asserts that for at least the last three years, FedEx placed notes on drivers' "settlement sheets" reminding them that their physical exams were set to expire in 30 days. FedEx admits this practice but claims that it began in mid-February 2005. FedEx has refused the Region's request for documents that would establish when the practice began.

[6] Although packages were loaded on Lynch's truck, he did not deliver any of them.

[7] Lynch was present at the representation hearing on some of these days, and he did not service his route on the days of his attendance.

[8] Under the Standard Contractor Operating Agreement (the Agreement), FedEx is required to give Contractors 30 days notice before terminating their insurance coverage.

Lynch was unable to obtain alternative coverage,[9] and was forced to terminate his agreement with FedEx on April 6. As a result of this termination, Scott's employment as Lynch's permanent driver came to an end. Scott has continued to drive for other FedEx drivers intermittently and on a temporary basis, but his employment has not been constant and his compensation has not been comparable to what he earned as Lynch's permanent driver. While FedEx has allowed Scott[10] to fill-in for other drivers, it has refused to allow Lynch to do the same despite the fact that he is qualified and his physical is up to date.[11]

The Region has sought information from FedEx concerning other drivers whose insurance had been terminated, and the reasons for the termination, including any terminations resulting from FedEx's discovery that contractors were driving with expired physical exams. FedEx produced no responsive documents.

FedEx contends in position statements that Lynch is primarily a joint employer operating through the separately incorporated Deliverite Inc., and as such he is excluded from protection under the Act. Although the Regional Director determined Lynch to be both a joint employer and a supervisor, FedEx argues that the Agency is estopped from pursuing a "supervisor only" theory because it would be in direct conflict with the Regional Director's conclusion. Alternatively, FedEx contends that Lynch's indemnity insurance was terminated for cause because he breached the Safe Driving Standards. FedEx finally asserts that in any event, Scott is not entitled to a remedy based on Lynch's charge because the relationship between Scott and FedEx is still intact, and relief for a non-discriminatee such as Scott would be inconsistent with the specific grounds for relief set forth in the Act.

ACTION

We conclude that a Section 8(a)(1) and (4) complaint should issue, absent settlement. FedEx acted unlawfully by

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[9] No insurance carrier would agree to provide coverage because Lynch's business was so small. One agent advised that the cost for individual coverage would be prohibitive.

[10] Scott has filed a Section 8(a)(1) and (3) charge concerning his lost full-time employment.

[11] Lynch alleges that on June 19, FedEx refused to allow him to drive for free for Brian McDonald when McDonald's son was in the hospital.

constructively terminating its employment relationship with Lynch for testifying at a Board proceeding, despite his status as its supervisor and joint employer. Further, although the termination of Scott's tenure as a permanent driver is a direct consequence of this violation, he is not entitled to a remedy in the circumstances of this case. The full remedy for the violation against the supervisor/joint employer should include backpay and restoration of his/its relationship with FedEx.

The Board has held that Section 8(a)(1) protects a statutory supervisor against discharge by an employer when the supervisor gives testimony adverse to an employer's interest at a Board hearing.[12] It is also established that an employer may not retaliate against a charging party for seeking a determination of the applicability of the Act to a given dispute.[13] In General Services, the Board found an 8(a)(4) violation where the employer refused to rehire a supervisor because of a charge he previously filed against the employer alleging that he was discharged because of his union activity, even though the Board ultimately determined in the first proceeding that he was a supervisor.[14] The protection a supervisor receives under Parker-Robb, in certain circumstances such as giving testimony adverse to an employer's interest at a Board proceeding or the processing of an employee grievance, stems from "the need to vindicate employee's exercise of their Section 7 rights."[15]

FedEx contends that Local No. 447, Plumbers (Malbaff Landscape Construction),[16] not General Services or Parker-Robb, should control the outcome of this case because the Regional Director primarily found Lynch to be a joint employer, and only in the alternative to be a supervisor. FedEx further contends that to find a violation solely on Lynch's status as a supervisor ignores the Regional Director's primary and initial finding of joint employer status, and is an attempt to improperly relitigate the issue of Lynch's status. In Malbaff, the Board refused to find a violation under Section 8(b)(2) where union pressure forced an employer to terminate his contract with a

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[12] Parker-Robb Chevrolet, 262 NLRB 402, 404 (1982).

[13] See General Services, 229 NLRB 940 (1977).

[14] Id. at 941.

[15] Parker-Robb Chevrolet, 262 NLRB at 403.

[16] Local No. 447, Plumbers (Malbaff), 172 NLRB 128 (1968).

subcontractor because the subcontractor's employees were not unionized. The Board reasoned that "if an employer does not violate Section 8(a)(3) by terminating a business relationship with another employer, union pressure designed to achieve the same end would not violate Section 8(b)(2)."[17]

However, the type of business relationship that existed in Malbaff does not exist in the joint employer business relationship between Lynch and FedEx, especially where Lynch also serves as a FedEx supervisor. The Board in Malbaff was dealing with a contractual relationship between two separate employers, each with its own employees, and allowed one employer to terminate that relationship because of the union or nonunion activity of the other employer's employees.[18] The Board did not address the lawfulness of terminating a relationship such as the one between Lynch and FedEx, where two employers jointly employ the same employees, and where one employer is also a supervisor for the other.

Significantly, questions concerning the relationships between employers and drivers, such as that between FedEx and Lynch, are a common occurrence in the trucking industry. They often require a Board determination of whether truck drivers such as Lynch are employees, supervisors, independent contractors, or joint employers.[19] Allowing an employer to terminate its relationship with a joint employer who was also its supervisor because he sought a Board determination of his status or testified adversely to the first joint employer in a Board proceeding would permit an employer, to subvert the Board's processes and impede access to the Board.[20] This would also have the

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[17] Local No. 447, Plumbers (Malbaff), 172 NLRB at 129.

[18] See Id.

[19] See, e.g., Deaton Truck Lines, Inc., 143 NLRB 1372 (1963), enfd. 337 F.2d 697 (5th Cir. 1964), cert. denied 381 U.S. 903 (1965); Roadway Package System, Inc., 326 NLRB 842 (1998); Slay Transportation Co., 331 NLRB 1292 (2000); Reading Rock, Inc., 330 NLRB 856 (2000); International Transfer of Florida, 305 NLRB 150 (1991).

[20] General Services, 229 NLRB at 942. See also Turner Transfer, Case 4-CA-25703, Advice Memorandum, dated April 11, 1996, where we found that a Section 8(a)(1) and (4) complaint was warranted because the employer constructively discharged an individual by reallocating work, resulting in a substantial reduction in his income. This work reallocation occurred after he testified in a

effect of discouraging employees from filing charges or being witnesses in Board proceedings, unlawfully interfering with the exercise of their Section 7 rights.[21]

Even assuming, as FedEx contends, that the Regional Director primarily found Lynch to be a joint employer as opposed to a supervisor, we are not precluded from applying the principles expressed in General Services and Parker-Robb to the case at hand. An employer which retaliates against any individual, whether that individual be a supervisor, a joint employer, an independent contractor, or a combination – such as Lynch - of more than one of the above, for participating in a Board proceeding constitutes asserting control over, and detering employee use of, Board processes. In General Services and Parker-Robb, such conduct was found to violate the Act, and the Board extended the protection of the Act to the nonemployees involved, i.e. supervisors. Such protection should be extended here where, as in General Services and Parker-Robb, an employer has retaliated against an individual, regardless of his actual status, for his participation in a Board proceeding.

As in General Services and Turner Transfer, Lynch's testimony at the Board hearing was for the purpose of ascertaining his, as well as other individuals' and the Union's, status under the Act. As in Parker-Robb, it was unfavorable to FedEx's position on at least some of those issues. Although the Regional Director ultimately first determined that Lynch, as a multiple route Contractor, was a joint employer because he was responsible for hiring, firing, and determining the wages for his second route driver, she did in fact also find Lynch was a supervisor because he exercised independent judgment when making these decisions that are essential to the performance of FedEx services, and thus in the interest of FedEx.[22] Therefore, this case is properly analyzed under the principles of Parker-Robb and General Services, as it involves retaliation against a nonemployee, a supervisor as well as a joint employer, for participating in Board proceedings

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representation case concerning his employee status, and in that case he was ultimately determined to be an independent contractor.

[21] See, General Services, 229 NLRB at 941; Parker-Robb Chevrolet, 262 NLRB at 404.

[22] See Deaton Truck Lines, Inc., 143 NLRB at 1378; Pacemaker Driver Service, 269 NLRB 971, 976 (1984), enfd. in relevant part, sub nom. Carrier Corp. v. NLRB, 768 F.2d 778 (6th Cir. 1985).

and a tendency to interfere with employees in the determination or vindication of their Section 7 rights.

The Region has found that FedEx's termination of his insurance two days after the representation hearing closed for breach of the safe driving standards, by driving with out a valid physical for one day, was clearly a constructive discharge. It was easily foreseeable by FedEx that Lynch would be unable to find an insurance carrier who would agree to provide coverage for such a small business, and that consequently he would be forced to terminate his agreement with FedEx. Due to the very short duration of Lynch's infraction, the timing of his constructive discharge (within days of the conclusion of the representation hearing), the fact that FedEx dispatched Lynch on February 4 knowing that his physical had expired, and FedEx's failure to identify other similarly situated individuals whose insurance lapsed, we agree with the Region that FedEx's proffered reason for terminating Lynch's insurance was pretextual, and that he was constructively discharged for his participation in the Board representation proceeding. Therefore, a Section 8(a)(1) and (4) complaint is warranted, absent settlement.

[*FOIA Exemptions 2 and 5*

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[23] [*FOIA Exemptions 2 and 5*
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[24] [*FOIA Exemptions 2 and 5*

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[25] [*FOIA Exemptions 2 and 5*

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[26] [FOIA Exemptions 2 and 5.]

[27] [*FOIA Exemptions 2 and 5*.]

[28] [*FOIA Exemptions 2 and 5*

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[29] [*FOIA Exemptions 2 and 5*

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